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In The
Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

v.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, THE STATES OF ALABAMA, DELAWARE, HAWAII, NEBRASKA, TENNESSEE, TEXAS AND UTAH AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is Congress' attempt to abrogate the States' sovereign immunity for claims based on Title II of the Americans with Disabilities Act a valid exercise of Congress' power to enforce the Fourteenth Amendment?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alabama, Delaware, Hawaii, Nebraska, Tennessee, Texas and Utah (collectively "the States") are sovereign States of the Union. As such, they have an overwhelming interest in the preservation of the principles of dual sovereignty, which are "a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). More specifically, they have an interest in insuring that Congress' power to abrogate the sovereign immunity of the States is circumscribed in a manner that recognizes the extraordinary nature of the act.

In this brief, submitted in support of the Petitioner, the Medical Board of California, the States argue that Congress' attempt to abrogate sovereign immunity for claims based upon Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"), is unconstitutional. The States take this position for two reasons. First, the evidence that the States themselves were engaged in unconstitutional behavior that required Title II of the ADA as a remedy is insufficient to support abrogation. The statutory text contains no explicit findings of unconstitutional activity, the legislative history is largely devoid of such evidence, and there is a dearth of judicial documentation of contemporaneous constitutional violations. Second, even if there were evidence of constitutional violations by the States that supported a legislative response, the remedy enacted by Congress, abrogation of the sovereign immunity of *all* States for *all* time, would be disproportionate to the constitutional violations Congress sought to address. A proportionate response would abrogate the sovereign immunity of those States where the history and

pattern of violation occurred and would be of some limited duration calculated to permit periodic review of the necessity of so extreme a remedy.

No State is, or should be, allowed to engage in unconstitutional discrimination against the disabled with impunity. Where States pursue a policy or practice of unconstitutional discrimination, federal courts may issue declaratory and injunctive relief.[1] *See Ex Parte Young*, 209 U.S. 123 (1908). Nor do the States contend that they should never be liable for money damages for violations of Title II of the ADA. Sovereign immunity does not apply to suits brought by the United States, and a State, in the exercise of its sovereign powers, may waive its sovereign immunity to private suits for damages under Title II of the ADA. Nor do the States take the position that it is impossible for Congress to abrogate their sovereign immunity. If a State engages in a pattern of unconstitutional discrimination, then it is arguably appropriate for Congress to abrogate that State's sovereign immunity, at least for a period of time. The States simply explain that this particular attempt by Congress, to abrogate the States' sovereign immunity for claims based on Title II of the ADA, is unconstitutional.

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[1] Of course, there is a difference between a policy or practice of *unconstitutional* discrimination and a violation of statutory requirements under Title II.

ARGUMENT

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), this Court reaffirmed the basic principle that Congress, acting pursuant to § 5 of the Fourteenth Amendment, may enact legislation that abrogates constitutional sovereign immunity for claims based on a particular statute. *Seminole Tribe*, at 58-65. However, because the power to effectively nullify constitutional sovereign immunity is so extraordinary, in order to do so Congress must (1) unequivocally express its intent to abrogate in the text of the statute, and (2) act pursuant to § 5 of the Fourteenth Amendment. *Id.* at 56-59. Unless both conditions are satisfied, Congress' attempt to abrogate the States' sovereign immunity is invalid. *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ. of Minn.*, 528 U.S. 1114 (2000).

In the present case, Congress unequivocally expressed its intent to abrogate sovereign immunity in the text of Title II of the ADA. *See* 42 U.S.C. § 12202; *see also Wessell v. Glendening*, 306 F.3d 203, 208 (4th Cir. 2002); *Thompson v. Colorado*, 278 F.3d 1020, 1025 (10th Cir. 2002), *cert. denied*, 122 S. Ct. 1960 (2002) (both expressly holding that Congress has made its intention clear). Thus, the critical issue becomes whether or not Congress acted pursuant to § 5 of the Fourteenth Amendment. This question requires an examination of the constitutional origins of the *statute purporting to abrogate sovereign immunity*. The mere fact that Congress has invoked its Fourteenth Amendment powers, however, does not mean that it has acted in accordance with the Fourteenth Amendment. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 637-38 (1999). Rather, determining whether an attempt to abrogate sovereign immunity is

valid requires application of the "congruence and proportionality" test set forth in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The "congruence and proportionality" test involves three questions. *See generally Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-74 (2001). *See also Wessell*, 306 F.3d at 209 (describing the inquiry as three questions). First, this Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, once this Court has "determined the metes and bounds of the constitutional right in question," it will examine "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States. . . ." *Garrett*, at 368.[2] In assessing whether Congress has identified unconstitutional conduct, courts look at judicial opinions, not at the pronouncements of Congress. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *Flores*, 521 U.S. at 519. Third, if there is a pattern of constitutional violations by the States identified, this Court determines whether the abrogation of sovereign immunity constitutes a proportionate response to the constitutional violations. *Florida Prepaid*, 527 U.S. at 646.

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[2] In making this determination, this Court must recognize that (1) conduct that may violate federal law does not necessarily violate the Constitution, *Kimel*, 528 U.S. at 83-84, (2) conduct by private actors or society in general cannot be ascribed to the States, *Id.* at 90-91, (3) unconstitutional conduct by governmental entities that are not considered arms of the State cannot be ascribed to the State, *Garrett*, 531 U.S. at 368-69, and (4) even if there is unconstitutional conduct by the States, the fact that one State or even several States have violated the Constitution does not constitute a pattern of constitutional violations by the States. *Kimel*, 528 U.S. at 90.

I. THE CONSTITUTIONAL RIGHT AT ISSUE IS THE RIGHT OF THE DISABLED TO BE FREE FROM ARBITRARY OR IRRATIONAL EXCLUSION FROM SERVICES, BENEFITS, AND PROGRAMS PROVIDED BY THE STATES.

With respect to the first inquiry, the nature of the constitutional right at issue is clear. This Court observed:

> [T]he result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. . . . If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.

Garrett, 531 U.S. at 367-68. "In the context of Title II, therefore, the constitutional right may be identified as follows: disabled people have a constitutional right not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state." *Wessell*, 306 F.3d at 210. *See also Garcia v. State Univ. of N.Y. Health Sci. Ctr.*, 280 F.3d 98, 109 (2nd Cir. 2001) (relying on the same purpose); *Thompson*, 278 F.3d at 1030 ("[A] state violates the Equal Protection Clause if it makes distinctions between the disabled and nondisabled without a rational justification.").

II. CONGRESS DID NOT IDENTIFY A HISTORY AND PATTERN OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES.

This Court has made it clear that Congress must identify a pattern of unconstitutional conduct by the States in order to support an abrogation of sovereign

immunity, yet this Court has provided little explicit guidance as to what materials are relevant in such an inquiry. *Wessell*, 306 F.3d at 210. For example, in *Flores*, this Court reviewed testimony in congressional committee hearings. *See Flores*, 521 U.S. at 530-31. However, in *Garrett*, this Court declined to consider "unexamined, anecdotal accounts of discrimination" presented to a congressional task force. *See Garrett*, 531 U.S. at 370-71. Thus, it is unclear whether the examination includes all materials and testimony considered by Congress or is limited to the actual statutory text. *See id.* at 371 ("Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.").

This case presents an opportunity for this Court to clarify what role, if any, "legislative history" – such as committee reports, testimony of individuals, or floor statements – should have in determining whether or not Congress has identified a pattern of unconstitutional activity by the States. As explained below, the States believe that the examination should be limited to the actual statutory text. However, even if this Court considers legislative history, in this case, the fact remains that the record on Title II of the ADA is inadequate to support a finding of a history or pattern of constitutional violations by the States.

A. The Examination of Congressional Findings Should Be Limited to the Statutory Text.

A determination that Congress has found a pattern of constitutional violations by the States, sufficient to

support an abrogation of sovereign immunity, should be based on the actual statutory text, without reference to legislative history. The reason for this is simple – "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Over a century and a half ago, this Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used. . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).[3] Although this principle is applicable to all statutory interpretation, it is especially compelling when the Federal

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[3] As Justice Scalia noted in another context:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men. Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997).

legislature would act to alter the constitutional balance between the States and the National Government by abrogating sovereign immunity. Where Congress makes such an effort, a Court must assure itself that Congress was convinced that the States were engaged in a pattern of unconstitutional activity.

It is impossible for this Court to know if those who voted for a law were aware of particular testimony or the contents of a specific committee report. It is impossible to know what forces or considerations influenced their vote. It is only the text of the law that was approved that can be known with sufficient certainty. Thus, statutory text should be the sole touchstone for determining whether a majority of both Houses of Congress, and the President who signed the bill into law, were convinced that the States were acting with the requisite disregard for the Federal Constitution.

With regard to Congress' attempted abrogation in Title II of the ADA, if examination is limited to the statutory text, then it is clear that Congress has not made findings of a pattern of unconstitutional discrimination by the States. This is true for two reasons. First, nothing in the statutory text identifies particular unconstitutional discrimination by the States. *Wessell*, 306 F.3d at 211. *See also Garrett*, 531 U.S. at 369 ("[T]he great majority of these incidents [of discrimination against the disabled] do not deal with activities of the States."). Second, although Congress made findings of "discrimination" within the statutory text, 42 U.S.C. § 12101(a), it is not clear that Congress' use of the term "discrimination" meant arbitrary or irrational conduct that would violate the Constitution. *Wessell*, at 211; *Thompson*, 278 F.3d at 1033. Consequently, the statutory text of the ADA does not support a

conclusion that Congress found a history or pattern of constitutional violations by the States.

B. Even a Review of the Entire Legislative History Does Not Reveal a Congressional Finding that the States Engaged in a Pattern of Unconstitutional Activity.

Even if this Court concludes that it should look beyond the statutory text and consider legislative history, there is no finding of a pattern of constitutional violations by the States. Indeed, the Fourth Circuit recently noted:

> Neither can we find an adequate record to support abrogation in the official congressional reports concerning the ADA. The reports do contain several examples of unfavorable treatment of disabled people by public entities. Even assuming that these anecdotal reports clearly demonstrate unconstitutional discrimination, the discrimination did not occur at the hands of the state.

Wessell, 306 F.3d at 211 (citations omitted). Similarly, the Tenth Circuit has observed:

> There is some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government "services, programs, or activities." However, most of these occurrences involve local officials and not the states. In any event, the vast majority of incidents discussed in the legislative record involving government "services, programs, or activities" are refusals by public entities to make accommodations for the disabled. The absence of numerous examples of unconstitutional discrimination against the disabled confirms the notion that Title II's primary focus was the failure by public

> entities to make accommodations for the disabled.

Thompson, 278 F.3d at 1033 (citations and footnotes omitted). *See also Rickenbacker v. Foster*, 274 F.3d 974, 982 (5th Cir. 2001) ("A closer look at the legislative history indicates that most of the examples of arguably unconstitutional governmental discrimination against the disabled involved local, not state, government."). In sum, a careful examination of legislative history indicates little or no evidence of a pattern of constitutional violations *by the States*.

C. There Is No Judicial Documentation of Constitutional Violations by the States.

Congress' failure to find a pattern of constitutional violations by the States is reinforced by the paucity of lawsuits against the States alleging unconstitutional disability discrimination in the years immediately prior to the enactment of the ADA. As Justice Kennedy, joined by Justice O'Connor, noted, if the States have engaged in unconstitutional conduct, "one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations." *Garrett*, 531 U.S. at 376 (Kennedy, J., joined by O'Connor, J., concurring). Yet, there is no such "judicial documentation" of unconstitutional discrimination by the States. *Id.*

There is simply no evidence of a pattern of unconstitutional activity by the States in the statutory text, the legislative history, or provided by the judicial record. Therefore, this Court can only conclude that there was no pattern of constitutional violations by the States to

support Congress' attempt to abrogate their sovereign immunity. Without such a finding, Congress' attempt to abrogate sovereign immunity for ADA Title II claims is invalid.

III. CONGRESS' ABROGATION OF THE SOVEREIGN IMMUNITY OF ALL STATES FOR ALL TIME IS A DISPROPORTIONATE RESPONSE TO CONSTITUTIONAL VIOLATIONS BY THE STATES.

As explained above, there is no pattern of unconstitutional activity by the States that justifies the abrogation of sovereign immunity for ADA Title II claims. Accordingly, it is unnecessary for this Court to reach the issue of whether the abrogation of sovereign immunity is, in fact, a proportionate response. *See College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Fund*, 527 U.S. 666, 675 (1999). However, if the Court were to conclude that Congress identified a pattern of conduct sufficient to support abrogation, then it should also conclude that Congress' decision to abrogate the sovereign immunity of *all* States for *all time* is disproportionate to the constitutional violations. *See Florida Prepaid*, 527 U.S. at 646.

Congress' abrogation of sovereign immunity is disproportionate for two reasons. First, the abrogation applies to *all* States rather than simply those States shown to be engaged in unconstitutional discrimination. In other words, all States are punished for the sins of the few. Such a remedy is not proportionate. A proportionate remedy would limit abrogation to those States that Congress has actually found to be acting in violation of the Constitution. If a State has not violated the Constitution, it ought not be stripped of so fundamental an attribute of its sovereignty.

Second, the States' immunity is abrogated for all time rather than for some limited period of time. In other words, because a State violated the Constitution in the 1980's, it will have no sovereign immunity in the 2030's. Such a remedy is not likely to be proportionate to the constitutional violations that support it. A proportionate remedy would limit the abrogation in time, thus requiring reconsideration of its necessity, with the possibility that it might be renewed, if there were evidence that the State continued in its pattern of unconstitutional activity. If a State ceased its unconstitutional activity, its immunity could be restored.

The approach advocated by the States is best illustrated by the Voting Rights Act, 42 U.S.C. §§ 1971-1973o, which was passed pursuant to Congress' power to enforce the Fifteenth Amendment. *See Garrett*, 531 U.S. at 373 n.8 ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."). The Voting Rights Act does not apply to *all* States or even to *all* jurisdictions within a particular State. *See* 42 U.S.C. § 1973b(b). Rather, it applies only to those States, or jurisdictions within a State, which have been identified by Congress as having violated voting rights. *See id.* In other words, those States that have not been identified as acting in violation of the Constitution are not subject to its remedial terms. Moreover, the restrictions imposed by the Voting Rights Act are not of unlimited duration. The statute allows jurisdictions to seek removal from its coverage. *See* 42 U.S.C. § 1973k. Once the violations have been corrected, and there is no likelihood of further violations, the State's sovereignty over its elections may be restored.

In the context of Congress' abrogation of sovereign immunity, this Court should require that (1) the abrogation be limited to those States actually engaged in constitutional violations; and (2) the abrogation be of limited duration, with an opportunity for extension if the State continues to engage in constitutional violations.

CONCLUSION

For the reasons stated above, and in the Petitioner's Brief, the judgment of the U.S. Court of Appeals for the Ninth Circuit must be REVERSED.

Respectfully submitted,

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